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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 909

GENERAL RETAIL CORPORATION (Delaware), *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Internal Revenue Code of 1939, as amended by Excess Profits Tax Act of 1950 and Section 501, Revenue Act of 1951:

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Section 445(g) 3, 4, 5, 6, 8, 9, 10, 13a
Section 503(a) 3, 4, 6, 7, 8, 10, 11, 15a

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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause January 2, 1959 (petition for rehearing denied February 11, 1959) affirming the decision of the Tax Court.

OPINION BELOW

The findings of fact and opinion of the Tax Court (Appendix A, *infra*, pp. 1a to 8a) are reported at 29 T.C. 632. The *per curiam* orders of the Court of Appeals affirming the decision of the Tax Court and denying the petition for rehearing have not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1959, and order denying petition for rehearing was entered February 11, 1959. (Appendix A, *infra*, p. 10a). The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1254.

QUESTION PRESENTED

Whether the constructive ownership rules of Section 503, Internal Revenue Code of 1939, (under which stock owned by a corporation is deemed to be owned proportionately by the stockholders of such corporation) should be imported into Section 430(e) so as to deny to a corporation the benefit of ceiling rates on Korean War excess profits taxes, to which it would otherwise have been entitled as a "new corporation."

STATUTE INVOLVED

The statutory provisions involved are Section 430(a) and (e), Internal Revenue Code of 1939; also Section 445(a) and (g), and Section 503(a). The pertinent portions are set forth in Appendix B, *infra*, pp. 10a to 15a.

STATEMENT

The facts are undisputed and are set forth in the opinion of the Tax Court, *General Retail Corporation (Delaware)*, 29 T. C. 632. Briefly stated, they are that petitioner, General Retail Corporation, was incorporated in 1948; that General Shoe Corporation, which had been in business since 1925, acquired for cash all its capital stock; and that petitioner purchased substantially all its assets from General Shoe Corporation at the latter's cost. In filing its income tax return for the taxable year ended October 31, 1951, petitioner computed its excess profits tax by using the ceiling

rates available to new corporations under Section 430 (e)(1), Internal Revenue Code of 1939, as amended.

The Commissioner of Internal Revenue determined a deficiency of $18,504.93, on the theory that because, under the constructive ownership rules of Section 503, Internal Revenue Code of 1939, the individuals who owned the capital stock of General Shoe Corporation also owned the capital stock of petitioner for the purposes of subparagraph (B) of Section 445(g)(2), these constructive ownership rules should also be applied for the purposes of clause (i) of Section 430(e)(2)(B) to the extent that transactions described in subparagraph (B) of Section 445(g)(2) are referred to; and that for this reason petitioner was barred from using the ceiling rates for new corporations. The Tax Court decided this issue of law in favor of the respondent, and the Court of Appeals affirmed.

The question involved is solely a question of statutory construction. It is petitioner's contention that Congress did not provide for the applicability of the constructive ownership rules of Section 503 to the factual situation here presented, and that the Tax Court indulged in judicial legislation when it held that they were applicable.

ARGUMENT

Before considering the exact language of Section 430(e), permitting new corporations, in computing excess profits taxes, to use ceiling rates which are graduated upwards in accordance with the number of years the corporation has been in business (the rate applicable to petitioner being 8%), it is necessary to consider Section 445(g), permitting new corporations to use an alternative average base period net income

computed by applying the average base period net income of return for the taxpayer's industry classification to the amount of its "total assets" and subtracting interest expense for twelve months. While both forms of so-called "relief" were made available by Congress to new corporations in general, certain classes of new corporations were made ineligible for the relief in each instance.

Paragraph (1) of subsection (g) of Section 445 denied the benefits of that Section (with certain specified exceptions) to corporations which had been parties to transactions described in paragraph (2) of subsection (g). One type of such transaction, described in subparagraph (B) of paragraph (2), was the acquisition of properties by the taxpayer from another corporation (not itself a new corporation), where 50% or more of the stock of each corporation was "owned directly or indirectly by the same individuals." Paragraph (3) of subsection (g) then went on to provide that "for the purposes of this subsection" the constructive ownership rules of Section 503 are applicable. This simply means, of course, that for the purpose of determining whether the new corporation was eligible to use the alternative average base period net income, the constructive ownership rules were to be applied. When Congress enacted Section 445(g), the second form of relief for new corporations provided in Section 430(e) had not yet been considered.

In the instant case, the petitioner, although organized in 1948, would not have been eligible to use the alternative average base period net income because General Shoe Corporation's stockholders were considered, under Section 503, to be the same as petitioner's stockholders. Petitioner is not, however, seeking the

right to use the alternative average base period net income for new corporations authorized by Section 445(g). What is involved in this case is the right to use the ceiling tax rates authorized by Section 430(e). This is a different type of relief for new corporations. It consists solely of a ceiling on the rate of the tax with respect to the first $300,000 of excess profits tax net income.

As in Section 445, certain classes of new corporations are ineligible to use the ceiling rates. Congress did not, however, provide that new corporations could qualify under Section 430(e) only if they could also qualify under Section 445. Under Section 445(g) the excess profits net income is less for a new corporation because its credit is greater, and the tax is less for that reason. On the other hand, under Section 430(e) the excess profits tax net income is the same, but the tax is less because the rate is less on the first $300,000 of excess profits tax net income. Some new corporations are entitled to the benefits of both relief provisions; some are entitled to benefits under one, but not the other; and some are not entitled to the benefits under either.

What the Tax Court and the Court of Appeals have done in this case is to hold that a new corporation which is ineligible under Section 445(g) is automatically ineligible under Section 430(e). If Congress had intended this result, it would have been easy for Congress to have said so. Congress could, indeed, have said so in such simple language that there could be no possible room for argument. But Congress deliberately did not do what the Tax Court says it intended to do.

Clause (i) of paragraph (2)(B) of Section 430(e) denies the benefits of the ceiling rates to any new corporation which had been a party to a transaction "described in section 445(g)(2)(A), (B), or (C) . . ." No reference is made either to paragraph (1) or to paragraph (3) of Section 445(g), and no reference is made to Section 503. Thus the effect of clause (i), to the extent that it adopts by reference the description in subparagraph (B) of paragraph (2) of Section 445 (g), is to deny the benefits of the ceiling rates where at least half of the new corporation's stock is owned by the same *individuals* who own at least half of the stock in an old corporation from which the new corporation acquired its assets; but the benefit of the ceiling rates is not denied to a new corporation simply because it acquired its assets from an old corporation which *itself* owns the stock of the new corporation.

Congress took the short cut of not repeating descriptions in paragraph (2) of Section 445(g), but of adopting those descriptions by reference. If Congress had repeated the descriptions verbatim, the constructive ownership rules of Section 503 would not have been applicable without an express statement to that effect. How then can it be said that they are applicable, without any express statement to that effect, merely because Congress adopted the descriptions by reference instead of repeating them verbatim?

To express the same thought somewhat differently, the draftsmen of clause (i) deliberately took out of context subparagraphs (A), (B) and (C) of paragraph (2) of Section 445(g) by omitting any reference to either paragraph (1) or paragraph (3) of subsection (g). By enacting clause (i) in this form, Congress excluded paragraphs (1) and (3) of subsection

(g), and by excluding paragraph (3), Congress excluded the constructive ownership rules of Section 503 from applicability.

Clause (ii) of paragraph (2)(B) of Section 430(e) clinches our argument. By this clause Congress made a new corporation ineligible where the same stockholders controlled both the new corporation and another corporation which was engaged in a similar business, provided that such control was vested in a group of not more than four persons. Control is defined to mean the ownership of more than 50 per centum of the stock. Whereas clause (i) did not mention, directly or indirectly, the constructive ownership rules of Section 503, the following statement is contained in clause (ii):

> "... . For the purpose of this clause, the ownership of stock shall be determined in accordance with the provisions of section 503, except that constructive ownership under section 503 (a)(2) shall be determined only with respect to the individual's spouse and minor children,"

There are two conclusions to be drawn from clause (ii). In the first place, the fact that Congress made the constructive ownership rules of Section 503 applicable for the purposes of clause (ii), but said nothing about them in connection with clause (i), furnishes strong support for the conclusion that Congress did not intend these constructive ownership rules to apply for the purposes of clause (i). In the second place, for Congress to say in clause (ii) that where the parent corporation is controlled by a group of not more than four persons, the subsidiary is ineligible (which is the result of applying the constructive ownership rules), is tantamount to saying that where the parent corporation is controlled by more than four persons an otherwise eligible subsidiary is still eligible.

The net effect of clauses (i) and (ii) is that a new corporation which is a wholly owned subsidiary of an old corporation is ineligible if (but *only* if): .....

> (1) its assets were acquired from the parent in a tax-free exchange;* or—
>
> (2) the subsidiary is engaged in a trade or business substantially similar to that of the parent, and a group of not more than four persons control the parent.**

In the instant case, petitioner is eligible because (1) there is no contention that it acquired assets from General Shoe Corporation in a tax-free exchange, and (2) there is no contention that General Shoe Corporation is controlled by a group of not more than four persons.

Strangely enough, at the same time that the Commissioner was litigating the instant case in the Tax Court, he was also litigating *Theatre Concessions, Inc. (Florida)*, in which a decision was rendered by the Tax Court on January 31, 1958, exactly one month after the decision in the instant case, involving facts substantially identical, so far as relevant to the issue here involved. *Theatre Concessions, Inc. (Florida)* is reported at 29 T. C. 754. Here again the Commissioner relied upon clause (i),—but instead of relying upon subparagraph (B) of Section 445(g)(2), the Commissioner relied upon subparagraph (A).

In *Theatre Concessions, Inc.*, as in the instant case, all the stock of the taxpayer corporation had been ac-

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* Clause (i) of Section 430 (e) (2) (B) by reference to subparagraph (A) of Section 445 (g) (2).

** Clause (ii) of Section 430 (e) (2) (B), applying the constructive ownership rules of Section 503, so that the persons who control the parent are considered to control the subsidiary also.

quired by its parent corporation for cash, and merchandise and supplies had been purchased from the parent corporation at the latter's cost. The Commissioner contended that petitioner's basis as to the merchandise and supplies thus acquired "is determined by reference to the basis of such [property] to the transferor" within the meaning of Section 445(g)(2)(A), and therefore, by virtue of Section 430(e)(2)(B)(i), the method of computing excess profits taxes provided by Section 430(e)(1)(A) was not available to petitioner. On this point, the Tax Court, speaking through Judge Kern, said:

> "With regard to respondent's first argument on this issue, we are of the opinion that the transaction here involved is not one described in section 445 (g) (2) (A). Petitioner's basis as to the merchandise and supplies purchased from Tallahassee Enterprises, Inc, was *its* cost. It is true that its cost was to be 'a sum equal to [the vendor's] costs for such merchandise and supplies,' but the fact that the price paid for merchandise is to be calculated with reference to the vendor's cost does not warrant a conclusion that its basis 'is determined by reference to the basis of such properties to the transferor.' We consider that the transactions referred to in section 445 (g) (2) (A) are among those particularized as exceptions to section 113 (a), and do not include a transaction in which the basis of the property is the cost to the acquiring corporation pursuant to section 113(a), even though that cost is calculated by reference to the cost of the vendor."

The second argument that the Commissioner made was that the alternative computation was not available to petitioner because of the provisions of Section 430(e)(2)(B)(ii). The petitioner had failed to prove

facts which would have taken it out of this exception. The proof was consistent with the theory that the parent corporation was controlled by not more than four persons and that the two corporations were engaged in a similar business. But the Commissioner had not made this contention at or before the hearing. The Tax Court held that the respondent should not be allowed to profit by this contention, based upon a failure of proof, because respondent advanced this theory for the first time, in his brief filed after the hearing of the case.

A circumstance in the *Theatre Concessions* case which we believe to be significant is that, although the Commissioner undertook to raise in his brief a new issue which had not been raised at or before the hearing, the Commissioner did not, even then, make the contention that is made by him in the instant case. Both cases were tried by attorneys working under the Regional Counsel in Atlanta, Georgia, and both cases were pending before the Tax Court at the same time. The only possible reason for the Commissioner's failure to rely upon subparagraph (B) of Section 445(g)(2) in the *Theatre Concessions* case was that the Commissioner did not consider the constructive ownership rules of Section 503 to be applicable with respect to clause (i) of Section 430(e)(2)(B).

The point decided against the petitioner in the instant case was decided in favor of the taxpayer by the District Court of the United States for the Western District of Texas February 24, 1958, in *Tuboscope Company* v. *Robert L. Phinney, District Director of Internal Revenue*. The District Director of Internal Revenue appealed the decision to the United States Court of Appeals for the Fifth Circuit, where the case has

been argued and is now under advisement (Docket No. 17,376). In the event of an affirmance there will be a conflict between the decision of the Court of Appeals in the instant case and the decision of another Court of Appeals on the same matter. The decision in the instant case was relied upon by the appellant in the *Tuboscope Company* case.

REASONS FOR GRANTING THE WRIT

It is believed that the Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court.

There are undoubtedly a number of corporate taxpayers whose excess profits tax liability under the Korean War excess profits tax law has not been settled, where the same question is involved. Beyond that, however, it is important to determine whether the constructive ownership rules of Section 503 are to be applied whenever the Commissioner of Internal Revenue thinks that they should be applied, even though Congress has not so provided and even though a "literal construction of [the] statute does no violence to common sense." (*Arroya* v. *United States*, decided May 4, 1959 by the Supreme Court of the United States.)

There is a conflict between the decision in the instant case by the Court of Appeals for the Sixth Circuit and the decision of a District Court in the Fifth Circuit, from which an appeal was taken and has been argued and submitted but not yet disposed of. It is assumed that the decision will be rendered before this petition is considered.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

29 T. C. No. 69

Docket No. 55272

TAX COURT OF THE UNITED STATES

General Retail Corporation (Delaware), *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Filed December 31, 1957

Corporation organized after 1945 but which acquired all its assets from parent corporation in business since 1925, *held*, to have commenced business prior to 1945 for excess profits tax purposes under section 430 (e), I.R.C. 1939, Excess Profits Tax Act of 1950, so as to be barred from preferential tax rate as a new corporation.

J. W. ALLEN, *Esq.*, and WILLIAM WALLER, *Esq.*, for the petitioner.

JACK D. YARBROUGH, *Esq.*, for the respondent.

Respondent determined a deficiency of $18,504.93 in petitioner's income (excess profits) tax for its taxable year ended October 31, 1951. The only issue is whether petitioner is entitled to compute its excess profits tax as a new corporation under section 430 (e) (1), Internal Revenue Code of 1939.

Findings of Fact

Certain facts are stipulated and are hereby found.

Petitioner, chartered under the laws of the State of Delaware on September 30, 1948, maintained its principal office at Nashville, Tennessee. Petitioner maintained its books and records on an accrual basis for fiscal years ended October 31. It filed corporate income tax returns from the fiscal year ended October 31, 1950 and 1951 with the collector of internal revenue for the district of Tennessee.

The incorporators elected the following directors of petitioner on September 30, 1948 to hold office for 1 year:

W. Maxey Jarman
W. M. Blackie
J. R. McCollum
F. M. Weisiger
B. P. Weisiger
E. L. Britain
W. Givan
E. C. Jones
K. Lawrence
P. C. Runyon
G. O. Petway

The directors on October 11, 1948, elected the following officers of petitioner to serve 1 year:

William Blackie, president
J. R. McCollum, executive vice president
F. M. Weisiger, vice president
E. L. Britain, vice president
W. Givan, secretary
E. D. Woods, treasurer

The individuals elected as directors and officers of petitioner also held the following positions with General Shoe Corporation, hereafter referred to as "General," during the period September 30 through December 31, 1948:

W. Maxey Jarman, chairman
W. M. Blackie, vice president
E. D. Woods, assistant comptroller
J. R. McCollum, employee
F. M. Weisiger, employee
B. P. Weisiger, employee
E. L. Britain, employee
W. Givan, employee
E. C. Jones, employee
K. Lawrence, employee
P. C. Runyon, employee
G. O. Petway, employee

Petitioner's authorized capital stock consisted of 1,000,000 shares, par value $1. The board of directors had discretionary authority to issue capital stock in such amounts and for such considerations as it determined. On October 21, 1948, the directors issued stock certificate

No. 1 for 1,000 shares in the name of Sarah A. Jarman, wife of W. Maxey Jarman.

On November 1, 1948, the stock certificate issued in the name of Sarah Jarman was transferred to General. General issued its check for $1,000 in payment for the stock. The stock certificate endorsed on November 1, 1948 over her signature discloses an irrevocable transfer for value received.

The stock certificate issued in the name of Sarah Jarman for 1,000 shares and a stock certificate for 10 shares, par value $100, issued to General under date of February 6, 1950, represented the only shares issued by petitioner. The stock certificate issued in the name of General replaced the certificate issued in the name of Sarah Jarman. General then owned all of the outstanding stock of petitioner. At that time individuals owning directly or indirectly 50 per cent or more in value of the outstanding stock or outstanding voting stock of General indirectly owned all outstanding stock of petitioner.

During November 1948, petitioner acquired from General several retail stores in Ohio. This acquisition consisted of assets acquired for their book value on the books of General, and for which General extended credit to petitioner on open account. The assets consisted of the following:

Inventories	$205,612.46
Leasehold improvements	138,813.51
Total	$344,425.97

The leasehold improvements had an adjusted basis for determining gain upon sale or exchange on December 1, 1950 of $51,916.99. It is stipulated that furniture and fixtures were also acquired, but no monetary value is assigned thereto.

The assets held by petitioner on December 1, 1950 consisted of the following:

Cash	$ 50,063.32
Inventories	329,677.84
Leasehold improvements	264,741.99
Total	$644,483.15

The adjusted basis for determining gain upon sale or exchange of leasehold for improvements on December 1, 1950 was $264,741.99.

Petitioner acquired a substantial part (all) of its assets from General during November 1948.

When General transferred the assets to petitioner, it owned all of the outstanding capital stock of petitioner. General commenced business in 1925 and has continuously engaged in business since that time.

Petitioner computed its excess profits tax for the fiscal year ended October 31, 1951 as a new corporation pursuant to section 430 (e) (1), Internal Revenue Code of 1939. Respondent determined that petitioner was not entitled to compute its excess profits tax for that fiscal year as a new corporation.

Petitioner is not a new corporation and did not commence business after July 1, 1945, within the meaning of section 430 (e), Internal Revenue Code of 1939, and is not entitled to compute its excess profits tax pursuant to the alternative method prescribed in section 430 (e) (1), Internal Revenue Code of 1939, relating to new corporations.

Opinion

OPPER, *Judge:* Petitioner claims to be entitled to the preferential tax treatment accorded "a new corporation" under section 430 (e), Internal Revenue Code of 1939, as

added by the Excess Profits Tax Act[1] of 1950. The facts are not in dispute. Petitioner acquired all of its assets from its parent, General, and while petitioner concededly commenced business after July 1, 1945, General had been operating since 1925. Petitioner says that its stock was owned by General and not by General's stockholders, and respondent insists that the rule of attribution requires that petitioner's stock be considered as being held by General's stockholders.

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[1] "(e) New Corporations.—

"(1) Alternative Amount.—In the case of a taxpayer which commenced business after July 1, 1945, and whose fifth taxable year ends after June 30, 1950, the amount referred to in subsection (a) (3) shall be—

" • • • • • • •

"(B) If the taxable year is the third taxable year of the taxpayer, an amount equal to 8 per centum of the excess profits net income for the taxable year, except that if the excess profits net income exceeds $300,000, the amount shall be the sum of $24,000 plus the amount determined under subparagraph (E) of this paragraph.

" • • • • • • •

"(2) First Five Taxable Years.—For the purpose of this subsection—

"(A) The taxable year in which the taxpayer commenced business and the first, second, third, and fourth succeeding taxable years shall be considered its first, second, third, fourth, and fifth taxable years, respectively.

"(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

"(i) Any corporation which during or prior to the taxable year was a party with the taxpayer to a transaction described in section 445 (g) (2) (A), (B), or (C), determined as if the date 'July 1, 1945' were substituted for the date 'December 1, 1950' in section 445 (g) (2) (C)."

What the issue really comes down to is whether the formula of section 503 can and must be imported into section 430 (e). The statute says in effect that corporations can qualify under section 430 (e) as having "commenced business" only if they would likewise so qualify as described in[2] section 445. Section 445 expressly requires for

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[2] "SEC. 445. AVERAGE BASE PERIOD NET INCOME—NEW CORPORATION.

"(a) New Corporation.—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

" • • • • • • •

"(g) Ineligible Corporations.—

"(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462 (g).

"(2) The transactions to which paragraph (1) applies are as follows:

" • • • • • • •

"(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

" • • • • • • •

"(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock."

its application the use of the principle[3] of section 503. We fail to see, therefore, how a corporation can have the benefits of not having commenced business before July 1, 1945, under section 445 without applying section 503; and if not a corporation which commenced business after 1945 under section 445, it does not qualify for the benefits of section 430 (e), where section 445 (g) applies as it does here.

In order to clarify what we think is the consequently inevitable effect of the interconnected statutory provisions, we set forth below a paraphrased version of the interplay of the three sections and their application to petitioner's situation:

> In the case of * * * [petitioner if it] commenced business [as limited below] after July 1, 1945, and * * * [its] fifth taxable year ends after June 30, 1950, the amount * * * [of excess profits tax] shall be [4] [computed at a preferential rate].
>
> [Petitioner] * * * shall be considered to have been in existence and to have had taxable years for any period during which [General,] * * * was in existence, and * * * [petitioner] shall be [then] considered to have commenced business [in 1925,[5]] * * * the earliest date on which * * * [General] commenced business: [6]

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[3] "SEC. 503. STOCK OWNERSHIP.

"(a) Constructive Ownership.—For the purpose of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 501 (a) (2), section 502 (e), or section 502 (f)—

"(1) Stock Not Owned by Individual.—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries."

[4] Section 430 (e) (1).

[5] As stipulated.

[6] Section 430 (e) (2) (B).

[if General] * * * during or prior to the [year end October 31, 1951] * * * was a party with * * * [petitioner] to a transaction described * * * [7] [as:]

The acquisition by * * * [petitioner] of * * * its assets from * * * [General], if * * * the outstanding stock * * * of * * * [petitioner] is * * * [considered as] owned, at the time of such acquisition, by individuals owning * * * [proportionally] 50 per centum or more in value of the outstanding stock * * * of * * * [General;[8] by reason that] stock [of petitioner] owned, * * * by * * * [General] * * * shall be considered as being owned proportionately by [General's] shareholders * * * [9]

Opinion

We think it inevitably follows that respondent is correct that petitioner cannot qualify as having commenced business after July 1, 1945; that section 430 (e) is accordingly inapplicable, and that, as a consequence, the deficiency was correctly determined. With such a clear statutory command, the legislative history is not available even were it more persuasive than is the present case. *John H. Watson, Jr.*, 27 B.T.A. 463, 465.

Decision will be entered for the respondent.

(Caption Omitted)

Decision

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed December 31, 1957, it is ORDERED AND DECIDED: That there is a deficiency

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[7] Section 430 (e) (2) (B) (i).

[8] Section 445 (g) (2) (B).

[9] Section 503 (a) (1), made applicable by section 445 (a) (3).

in income (excess profits) tax for the taxable year ended October 31, 1951 in the amount of $18,504.93.

Entered: Jan. 3, 1958.

(Signed) CLARENCE V. OPPER,
Judge.

(Caption Omitted)

Petition for Review of Decision of the Tax Court of the United States

(Filed February 19, 1958)

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

General Retail Corporation, the petitioner in this cause, by William Waller, counsel, hereby files its petition for review by the United States Court of Appeals for the Sixth Circuit of the decision entered by the Tax Court of the United States on January 3, 1958, ordering and deciding that there is a deficiency in petitioner's income (excess profits) tax for the taxable year ended October 31, 1951, in the amount of $18,504.93.

Petitioner is a Delaware corporation with its principal office in Nashville, Davidson County, Tennessee. The return for the period here involved was filed with the Director of Internal Revenue at Nashville, Tennessee, whose office is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ WILLIAM WALLER
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Judgment

(Filed January 2, 1959)

The sole issue on this appeal is whether the petitioner taxpayer is entitled to the preferential treatment accorded to new corporations by section 430(e) of the Internal Revenue Code of 1939, as added by section 501 of the Revenue Act of 1951, c. 521, 65 Stat. 452, relating to Korean War excess profits taxes. The decision of this issue involves the construction and application of section 430(e) and also sections 445(g) and 503.

The Tax Court in a concise and convincing opinion by Judge Opper decided that the "clear statutory command" barred the taxpayer from such preferential tax treatment. 29 T.C. 632. We agree.

The decision of the Tax Court is affirmed.

Order Denying Petition for Rehearing

(Filed February 11, 1959)

The petition of General Retail Corporation for rehearing of the judgment entered January 2, 1959, having been duly considered, and it appearing that no good reason for granting a rehearing is therein set forth, the petition is denied.

APPENDIX B

Statutes Involved

(Internal Revenue Code of 1939, as amended by Excess Profits Tax Act of 1950 and Section 501, Revenue Act of 1951).*

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* Sections 430 to 472, inclusive, were added to the Internal Revenue Code of 1939 by Section 101 of the Excess Profits Tax Act of 1950, and made effective with respect to taxable years ending after

Section 430(a) General Rule.—"In addition to other taxes imposed by this chapter, there shall be levied, collected, and paid for each taxable year ending after June 30, 1950, and beginning before July 1, 1953, upon the adjusted excess profits net income, as defined in section 431, of every corporation (except a corporation exempt under section 454) an excess profits tax equal to whichever of the following amounts is the lesser:

* * *

"(3) in the case of a corporation for which an amount is determined for the taxable year under subsection (e), the amount determined under such subsection.

* * *

"(e) New Corporations.

"(1) Alternative Amount.—In the case of a taxpayer which commenced business after July 1, 1945, and whose fifth taxable year ends after June 30, 1950, the amount referred to in subsection (a)(3) shall be—

* * *

"(B) If the taxable year is the third taxable year of the taxpayer, an amount equal to 8 per centum of the excess profits net income for the taxable year, except that if the excess profits net income exceeds $300,000, the amount shall be the sum of $24,000 plus the amount determined under subparagraph (E) of this paragraph.

* * *

"(2) First Five Taxable Years.—For the purpose of this subsection.

"(A) The taxable year in which the taxpayer commenced business and the first, second, third, and fourth succeeding

---

June 30, 1950. Section 430(e) was added by Section 501 of the Revenue Act of 1951, which changed former subparagraph (e) to the subparagraph (f). The 1951 amendments were also made applicable to taxable years ending after June 30, 1950.

taxable years shall be considered its first, second, third, fourth, and fifth taxable years, respectively.

"(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

"(i) Any corporation which during or prior to the taxable year was a party with the taxpayer to a transaction described in section 445 (g)(2)(A), (B), or (C), determined as if the date 'July 1, 1945' were substituted for the date 'December 1, 1950' in section 445 (g)(2)(C).

"(ii) Any corporation if a group of not more than four persons who control the taxpayer at any time during the taxable year also controlled such corporation at any time during the period beginning twelve months preceding their acquisition of control of the taxpayer and ending with the close of the taxable year; but only if at any time during such period (and while such persons controlled such corporation) such corporation was engaged in a trade or business substantially similar to the trade or business of the taxpayer during the taxable year. For the purpose of this clause, the term 'control' means the ownership of more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock. A person shall not be considered a member of the group referred to in this clause unless during the period referred to in this clause he owns stock in such corporation at a time when the members of the group control such corporation and he owns stock in the taxpayer at a time when the members of

the group control the taxpayer. For the purpose of this clause, the ownership of stock shall be determined in accordance with the provisions of section 503, except that constructive ownership under section 503 (a)(2) shall be determined only with respect to the individual's spouse and minor children.

* * *

If as of the beginning of December 1, 1950, the adjusted basis for determining gain upon sale or exchange of the aggregate assets theretofore acquired by the taxpayer in transaction described in clauses (i) and (iii) (or acquired in the ordinary course of business in replacement of such assets) and held by it at such time constituted less than 20 per centum of the adjusted basis for determining gain upon sale or exchange of its total assets held at such time, then transactions described in such clauses occurring prior to such date shall be disregarded in determining the date as of which the taxapyer shall be considered to have commenced business.

* * *

Section 445. Average Base Period Net Income—New Corporation.

"(a) New Corporation.—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

* * *

"(g) Ineligible Corporations.

"(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be en-

titled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462(g).

"(2) The transactions to which paragraph (1) applies are as follows:

"(A) The acquisition by the taxpayer from another corporation of properties the basis of which in its hands is determined by reference to the basis of such properties to the transferor;

"(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

"(C) The acquisition by the taxpayer of a substantial part of the properties distributed on or after December 1, 1950, by another corporation, if such properties constituted a substantial part of the business assets of such other corporation, and if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is owned directly or indirectly by individuals who at the time of such distribution owned directly or indirectly 50 per centum or more in value of the outstanding stock or outstanding voting stock of such other corporation;

"(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock.

* * * *

Section 503. Stock Ownership.

"(a) Constructive Ownership.—For the purpose of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 501 (a)(2), section 502 (e), or section 502 (f)—

"(1). Stock Not Owned by Individual.—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

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JUN 4

No. 909

In the Supreme Court of the United States

OCTOBER TERM, 1958

GENERAL RETAIL CORPORATION (DELAWARE),
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 1a–8a) are reported at 29 T.C. 632. The *per curiam* opinion of the Court of Appeals (Pet. 10a) is reported at 262 F. 2d 591.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1959. (Pet. 10a.) A petition for rehearing was denied on February 11, 1959. (Pet. 10a.) The petition for a writ of certiorari was filed on May 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether taxpayer is entitled to the preferential treatment accorded to new corporations by Section 430(e) of the Internal Revenue Code of 1939 (relating to Korean War excess profits taxes).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 (Sections 430, 445 and 503); Treasury Regulations 111 (Section 29.503(a)–2); and Treasury Regulations 130 (Section 40.430–2(e)), are set forth in the Appendix, *infra*, pp. 7–11.

STATEMENT

The material facts as found by the Tax Court (Pet. 1a–4a) may be summarized as follows:

The taxpayer-corporation was chartered under the laws of Delaware on September 30, 1948, and has its principal office at Nashville, Tennessee. (Pet. 1a.)

General Shoe Corporation, which commenced business in 1925 and has continuously engaged in business since that time, owned all of the outstanding stock of the taxpayer at all times material hereto. (Pet. 2a–4a.)

During November, 1948, taxpayer acquired substantially all of its assets from its parent corporation (General Shoe Corporation) at their book value on the books of General Shoe, which extended credit to taxpayer on open account. (Pet. 3a–4a.)

Taxpayer maintained its books and records on an accrual basis for fiscal years ended October 31. In

filing its income tax return for the fiscal year ended October 31, 1951, taxpayer computed its excess profits tax as a new corporation pursuant to Section 430(e)(1) of the Internal Revenue Code of 1939. (Pet. 1a, 4a.)

The Commissioner determined that taxpayer was not entitled to compute its excess profits tax on that basis. (Pet. 4a.) The Tax Court sustained the Commissioner (Pet. 8a) and the Court of Appeals affirmed. (Pet. 10a.)

ARGUMENT

Both of the courts below sustained the Commissioner's determination that the taxpayer-corporation is not entitled to the preferential treatment accorded to new corporations by Section 430(e) of the 1939 Code, as added by Section 501 of the Revenue Act of 1951, c. 521, 65 Stat. 452 (Appendix, *infra*), and we submit that the decision is clearly correct.

In November, 1948, taxpayer acquired all of its assets (retail shoe stores) from its parent corporation and sole stockholder, General Shoe Corporation. (Pet. 4a.) Obviously, the same individuals who owned the stock of General Shoe Corporation were, for all practical purposes, the owners of the subsidiary corporation. As the courts below concluded from analysis of the relevant provisions, it is the "clear statutory command" that constructive ownership of stock shall be treated as equivalent to actual ownership in situations like the one at bar. (Pet. 8a, 10a.)

General Shoe Corporation had commenced business in 1925 (Pet. 4a) and hence could not qualify as a new corporation under Section 430(e). Section

430(e)(2)(B) provides that in certain circumstances a taxpayer shall be considered to have commenced business on the date when another corporation commenced business. This is so where, during or prior to the taxable year, such other corporation was a party with taxpayer to a transaction described in Section 445(g)(2). Subparagraph (B) of Section 445(g)(2) covers an acquisition by the taxpayer of a substantial part of its assets from another corporation, if 50 per centum or more in value of the outstanding stock of taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning, directly or indirectly, 50 per centum or more in value of the outstanding stock of the transferor. These provisions are correlated with, and explained by, paragraph (3) of Section 445(g), which states that the provisions of Section 503 shall be applicable in the determination of ownership of stock. And Section 503(a)(1) sets forth that stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

In short, the provisions of Section 445(g)(2)(B) are incorporated into Section 430(e) by explicit reference, and the former expressly requires the use of Section 503 for purposes of determining ownership. That being so, taxpayer is barred from preferential tax treatment by the clear command of the statute. (Pet. 8a, 10a.)

In view of this clear statutory command, the courts below found it inappropriate to consider the legisla-

tive history. See *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89. However, examination of the congressional reports makes it even more plain that Congress never intended to treat a corporation like the instant taxpayer as a new corporation for purposes of the preferential rates. Such rates were intended to encourage new techniques, new processes and new corporations and were purposefully denied to new corporations whose assets were transferred from old corporations under the same control. See S. Rep. No. 781, 82d Cong., 1st Sess., pp. 72–74 (1951–2 Cum. Bull. 458, 509–510); Summary of the Provisions of the Revenue Act of 1951 as agreed to by the Conferees prepared by the Staff of the Joint Committee on Internal Revenue Taxation, October, 1951, p. 47 (1951–2 Cum. Bull. 287, 322).[1]

It should also be noted that the question raised by the petition is of no general importance. The taxing provisions involved are inapplicable to tax years beginning on or after January 1, 1954 (Section 430(a) of the Internal Revenue Code of 1939, as amended by the Act of July 16, 1953, c. 202, 67 Stat. 175) and it does not appear that the decision here will affect any significant number of pending cases.

[1] The incongruity of taxpayer's construction of the statute (Pet. 6) is illustrated by its contention that the special rates should be accorded to a new corporation acquiring all its assets from the parent corporation owning its stock, but denied to a new corporation acquiring its assets from another corporation if the stock of both corporations was owned by the same individuals.

CONCLUSION

The decision is correct. The case presents no question of general importance and there is no conflict of decision among the circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
A. F. PRESCOTT,
L. W. POST,
Attorneys.

JUNE 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 430 [as added by Sec. 101 of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137] IMPOSITION OF TAX.

(a) *General Rule.*—In addition to other taxes imposed by this chapter, there shall be levied, collected, and paid for each taxable year ending after June 30, 1950, and beginning before July 1, 1953, upon the adjusted excess profits net income as defined in section 431, of every corporation (except a corporation exempt under section 454) an excess profits tax equal to whichever of the following amounts is the lesser:

(1) 30 per centum of the adjusted excess profits net income, or

* * * * *

(e) [as added by Sec. 501 of the Revenue Act of 1951, c. 521, 65 Stat. 452] *New Corporations.*—

(1) *Alternative amount.*—In the case of a taxpayer which commenced business after July 1, 1945, and whose fifth taxable year ends after June 30, 1950, the amount referred to in subsection (a)(3) shall be—

* * * * *

(B) If the taxable year is the third taxable year of the taxpayer, an amount equal to 8 per centum of the excess profits net income for the taxable year, except that if the excess profits net income exceeds $300,000, the amount shall be the sum of $24,000 plus the amount determined under subparagraph (E) of this paragraph.

* * * * * *

(2) *First five taxable years.*—For the purpose of this subsection—

(A) The taxable year in which the taxpayer commenced business and the first, second, third, and fourth succeeding taxable years shall be considered its first, second, third, fourth, and fifth taxable years, respectively.

(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

(i) Any corporation which during or prior to the taxable year was a party with the taxpayer to a transaction described in section 445(g)(2) (A), (B), or (C), determined as if the date "July 1, 1945" were substituted for the date "December 1, 1950" in section 445(g)(2)(C).

* * * * *

(26 U.S.C. 1952 ed., Sec. 430.)

SEC. 445 [as added by Sec. 101 of the Excess Profits Tax Act of 1950, *supra.*] AVERAGE BASE PERIOD NET INCOME—NEW CORPORATION.

(a) *New Corporation.*—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

* * * * *

(g) *Ineligible Corporations.*—

(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it

shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462(g).

(2) The transactions to which paragraph (1) applies are as follows:

* * * * * *

(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

* * * * * *

(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 445.)

SEC. 503. STOCK OWNERSHIP.

(a) *Constructive Ownership.*—For the purpose of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 501(a)(2), section 502(e), or section 502(f)—

(1) *Stock not owned by individual.*—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 503.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.503(a)–2. *Stock not owned by individual.*—In determining the ownership of stock for any of the purposes set forth in section 29.503(a)–1, stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries. For example, if A and B, two individuals, are the exclusive and equal beneficiaries of a trust or estate, and if such trust or estate owns the entire capital stock of the M Corporation, and if the M Corporation in turn owns the entire capital stock of the N Corporation, then the stock of both the M Corporation and the N Corporation shall be considered as being owned equally by A and B as the individuals owning the beneficial interest therein. See also section 29.503(a)–6.

Treasury Regulations 130, promulgated under the Internal Revenue Code of 1939:

> SEC. 40.430–2 [as amended by T.D. 5997, 1953–1 Cum. Bull. 312, 314]. *Rate of tax.*— * * *
>
> (e) *New corporations.* * * *
>
> * * * * *
>
> (5)(i) If any corporation during or prior to the taxable year for which the excess profits tax is being determined was a party with the taxpayer to a transaction described in section 445(g)(2) (A), (B), or (C), determined as if the date "July 1, 1945" were substituted for the date "December 1, 1950" in section 445(g)(2)(C), and if such other corporation had commenced business prior to the date on which the taxpayer commenced business, then the taxpayer, under the provisions of section 430(e)(2)(B)(i), shall be deemed to have commenced business on the date such other corpo-

ration commenced business. The taxpayer shall also be considered to have been in existence during the whole period such other corporation was in existence and to have had taxable years during such period as determined under the provisions of (4) above. * * *

* * * * *

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